United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-4117

United States Court of Appeals
FOR THE SECOND CIRCUIT

ROBERT W. BLANCHETTE, etc.,

Petitioners,

against

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

B/P/S

PETITIONERS' BRIEF

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PETITIONERS' BRIEF

Statement of the Issues

1. Was an implementation plan adopted by the respondent, Environmental Protection Agency under the Clean Air Act, 42 U.S.C. § 1857, invalidated by the failure of the agency to prepare an Inflation Impact Statement as required by Executive Order 11821, November 27, 1974?

2. Was the implementation plan invalid because the Environmental Protection Agency based its action partially on inaccurate and erroneous premises?

3. Was the implementation plan invalid because of the Environmental Protection Agency's failure to take into consideration other environmental factors which might flow from the action taken?

Statement of the Case

This is a proceeding to review an implementation plan with respect to abatement of air pollution which was promulgated by the Environmental Protection Agency by publication in the Federal Register on May 29, 1975, 40 F.R., No. 104, pp. 23279-80. The implementation plan was adopted pursuant to 42 U.S.C. § 1857c-5. This review proceeding is authorized by 42 U.S.C. § 1857h-5(b)(1).

The action of the federal agency was taken in order to make the Cos Cob, Connecticut generating plant subject to the Connecticut Regulations for the Abatement of Air Pollution, sections 19-508-1 through 19-508-25. The Cos Cob plant supplies electric motive power for the New Haven Line, which serves 26,000 regular daily commuters and a weekday average daily ridership of more than 66,000.*

At all pertinent times prior to April 1, 1976, the Cos Cob plant was operated by the petitioners, under contract with the Connecticut Department of Transportation and

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* These figures, while appearing to differ from those submitted in the affidavit and Exhibit A of John F. Davis with the Notice of Motion herein, are essentially the same. As explained on said Exhibit A, the monthly commutation ridership is developed by applying a factor of 38 to the number of tickets sold. Dividing the April 1975 ridership by 38, it appears that 25,745 monthly commutation tickets were sold for use during that month. In addition, there were 532 school commutation tickets sold during April 1975. Mr. Davis' affidavit included only the major classes of tickets and similarly omitted "miscellaneous" of which there were 17,536 tickets sold during April 1976. Dividing Mr. Davis' rides for 10 trip, round trip, off-peak and one way tickets during April 1975 by 30, one obtains an average of approximately 14,000 riders per day. Commuters use their monthly tickets twice a day for an additional 52,000 weekday rides.

The precise number of riders is not controlling. Of importance is the fact that the respondent omitted to consider the impact of the implementation plan upon the petitioner's patrons, whatever their number.

the Metropolitan Transportation Authority of the State of New York. Those two state agencies pay the deficits of the New Haven Line passenger operation. The plant had been held to be a facility of the Connecticut Department of Transportation and therefore exempt from state regulation by *Town of Greenwich* v. *Connecticut Transportation Authority,* 166 Conn. 337 (1974).

On April 1, 1976 the petitioners ceased to operate the facility, and operation was taken over by Consolidated Rail Corporation (hereafter called ConRail). See the Railroad Reorganization Act of 1973, P.L. 93-236, 87 Stat. 985 and the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, 90 Stat. 31. Title to the Cos Cob generating plant remains in petitioners, subject to a long term lease to the State of Connecticut.

POINT I

The adoption of the implementation plan was invalid by reason of the failure of the respondent to prepare an Inflation Impact Statement as required by Executive Order 11821.

Respondent does not deny that it did not prepare an Inflation Impact Statement (I.I.S.). By confession and avoidance, it attempts to justify the omission. The hearing was held on February 18, 1975. Respondent seeks to rely on an inter-office memorandum of February 24, 1975 which establishes a threshhold criteria for an I.I.S. of $100 million. The memorandum or "Interim Procedure for Inflation Impact Statement" was not issued until one week after the hearing on the implementation plan during which the petitioner challenged the respondent's right to proceed, absent the I.I.S. required by Executive Order 11821. (App. 23a).

Inasmuch as EPA had not issued its internal guidelines prior to the February 18, 1975 hearing, and was unaware

of Executive Order 11821 or OMB Circular A-107 (App. 24a), it is obvious that it could not and did not comply with the Executive Order prior to commencement of the rule making proceeding to adopt the implementation plan. Nor does the respondent claim that an I.I.S. concerning said implementation plan was ever issued.

It is conceded that the Cos Cob generating plant, constructed in 1907, cannot be operated in compliance with federal environmental statutes or regulations (including the implementation plan here in issue). The Connecticut Department of Transportation (CDOT), through its spokesman at the February 18, 1975 hearing, apprised respondent of its program to minimize offensive visible emissions from Cos Cob pending a long range program for "conversion from Cos Cob supplied power to commercially supplied power." CDOT stressed the massiveness of this $68 million program which is dependent upon a grant of federal funds by Urban Mass Transportation Administration (UMTA). Despite the fact that federal funding has not yet been made available, it cannot be gainsaid that the program to phase out Cos Cob may indeed have an inflationary impact. (Document 52 of the record)

The alternative to CDOT's conversion program would be the immediate closure of Cos Cob as a source of traction power and the de facto abandonment of the New Haven Line. If this plant shuts down, the entire New Haven Line between New Haven and New York will cease to operate, as the 25 cycle, single phase, traction power produced by Cos Cob cannot be purchased from any utility company. It seems reasonable to assume that most, if not all, the 26,000 purchasers of monthly commutation tickets between points on the New Haven Line and Grand Central Terminal, commute to New York City to earn their livelihood. In addition, the New Haven Line fare structure permits many others to travel to and from work on other forms of tickets, such as ten ride,

one way and off-peak discount tickets. (Exhibit A to Mr. Davis' affidavit shows 5,210 ten ride tickets sold in April, 1975) This is possible because those employed in the arts and media frequently work irregular hours and need not come into the city daily.

Conservatively, let's hypothesize that 30,000 people must travel to New York daily and that the additional riders carried on the New Haven utilize the railroad for discretionary travel. As shown in petitioners' motion papers, there is virtually no alternative bus service available between points on the New Haven Line and New York City. The respondent should have considered the cost impact of the implementation plan upon:

A. Businesses conducted in New York City.

Will they lose their employees by reason of lack of public mass transportation facilities? If so, what will be the effect on the ability to continue the conduct of business? If not, what will be the effect on the workers' productivity if they are forced to seek alternate means of transportation? If 30,000 productive employees are lost by New York businesses, what will be the effect on the net income of the businesses, as well as on the gross national product?

B. Individual wage earners.

What will be the impact if they are unable to retain their present employment? Will they be able to find employment in Connecticut where the high unemployment index is already troublesome? Is it economically feasible to commute to New York City by private automobile? The Federal Highway Administration Release 75-75 found that average car pool occupancy was 1.4 persons. Even assuming that car pools can be arranged, this would require the purchase of at least 20,000 automobiles. Inasmuch as no new vehicle can be purchased for under $3,000, the capital cost alone to provide private transportation would be over $60 million. Operating costs of private transportation are considerably higher than commutation fares. Reproduced in

the Addendum is a table from FHWA Release 75-75. The table shows that for 25 miles, the cost of gasoline, oil, maintenance, repair, parking, insurance and depreciation, assuming all the cars are sub-compacts, is $1,149 a year. In addition, there is an annual cost for tolls of $483 based on 230 work days. The Court can take judicial notice that the parking fees of $12.08 per month represents the cost for 2 or at most 3 days in midtown or the financial district, not a month. Even using FHWA parking figures, adjusted for the toll charges, the operating cost of the automobile would be $1,632 per year, which for two occupants would be $68 a month. For 1.4 occupants it would be $116.50 per month. These out-of-pocket costs compare with the New Haven commutation fare of $56 a month for the same distance. Again conservatively assuming that the New Haven Line commuter would form car pools of two per auto, rather than 1.4, the increased out-of-pocket costs compared to rail fares would exceed $4 million, plus the difference between a $12 monthly parking fee and the prevailing fee in midtown and the financial district. This further assumes that there is space for 20,000 more automobiles to park in the city daily, and if not, what would be the cost impact of providing such facilities?

C. The City and State of New York.

If the 30,000 commuters of the New Haven Line working in New York City earn an average of only $20,000, their gross income would amount to $600 million. The loss of the non-resident tax on this income would cost the City of New York several million dollars, particularly since many commuting executives are high salaried. Similarly, New York State non-resident income tax revenue would be reduced by upward of $20 million annually. On the other hand, if private transportation is feasible, the respondent failed to consider the enormous sums which would be required to construct miles and miles of additional highway lanes and bridges to provide vehicular access to Manhattan,

or alternatively, how much precious fuel will be consumed while autos idle in traffic congestion if 20,000 additional vehicles attempt to enter the city by existing routes.

D. Air pollution.

It simply is incredible that the Environmental Protection Agency would show such utter disregard for the total environmental consequences of its implementation plan as to ignore the cost impact inherent in the likely aggravation of New York City's air pollution problem. This court can take judicial notice of this problem by virtue of its recent consideration of the Clean Air Act in *Friends of the Earth, et al.* v. *Carey, et al.*, 75-7497. Petitioners could not possibly measure the cost impact of 20,000 additional autos entering Manhattan daily. Although EPA was unwilling, it should have attempted to do so, since in *Friends of the Earth* the EPA's Regional Administrator advised Judge Duffy that increased utilization of cars "will detrimentally affect the public health and welfare." (p. 3434 of this Court's printed decision, fn 18) In any event, the burden was on the defendant to find prior to promulgation of the implementation plan, that this possible—if not probable—consequence of its action, would have mere micro-economic impact.

It is evident that the potential impact of the implementation plan could well be on a macro-economic scale, far beyond the threshhold criteria in the guidelines attached to Mr. Gamse's affidavit. There is no need to speculate on all the other impacts the implementation plan could have, such as on competition, and the availability of important products and services. Nor is it essential that the Court know what the cumulative impact would be. The respondent's cavalier disregard of the Executive Order and omission of the prerequisite I.I.S. vitiates the implementation plan.

The Administrator could easily have corrected this omission, which was called to his attention on February 18, 1975, when the interim procedures were circulated by the EPA on February 24. The argument of respondent's Counsel and the affidavit of Mr. Gamse do not remedy this omission. The omission cannot be cured during judicial review. Even if the interim procedure provided by the EPA Office of Planning and Evaluation correctly established the threshhold criteria at $100 million, the fact remains that the potential impact of this major rule making proceeding was at no time evaluated by the Administrator. Post hoc rationalization will not cure failure of the agency to make proper findings. *CBS* v. *FCC* (D.C. Cir. 1971), 454 F2d 1018, 1034; *City of Lafayette* v. *SEC* (D.C. Cir. 1971), 454 F2d 941, 952, aff'd. 411 U.S. 747.

We have been unable to find any reported decisions interpreting the requirement of Executive Order 11821 that federal agencies certify that the inflationary impact of all major proposals for the promulgation of rules and regulations has been evaluated. We feel, however, that an analogy can be drawn with the case law on the requirement for environmental impact statements (42 U.S.C. § 4332 (2)(C)), of which there is a plethora.

Under judicial precedents defining "major federal actions," it is apparent that the Cos Cob situation falls well within that sphere. See *Monroe County Conservation Council, Inc.* v. *Volpe* (C.A. 2d 1972) 472 F2d 693, which held that in view of the fact that the cost of a viaduct section alone would be over $14,000,000, of which the federal government contemplated contributing 60 percent, the construction of an expressway through a public park was a "major action" within the meaning of Sec. 4332(2)(C). *National Resources Defense Council, Inc.* v. *Grant* (N.C. 1972) 341 F. Supp. 356, held that a watershed project contemplating 66 miles of channelization, with expenditures of $1,503,831, of which $706,684 was to be federally funded,

was a major federal action (at 366, 367). A commitment by HUD to guarantee $18,000,000 in bond obligations for development of a new community pursuant to a program of housing and urban development was a "major federal action" significantly affecting the quality of the human environment within the meaning of the section. *Sierra Club* v. *Lynn* (C.A. 5th 1974), 502 F2d 43, 57, rehearing den. 504 F2d 760, cert. den. 95 S. Ct. 2001, 421 U.S. 994.

For examples of other projects of considerably less impact than Cos Cob which have been held to be "major federal actions" significantly affecting the quality of the human environment, see *Businessmen Affected Severely by Yearly Action Plans, Inc.* v. *D.C. City Council* (D.C. 1972) 339 F.Supp. 793 (downtown urban renewal project); *Sterling* v. *Brinegar* (C.A. 2d 1975) 511 F2d 489 (Federal Highway Administration approval of final plans and commitment of federal funds for construction of a bridge); *Barta* v. *Brinegar* (Wis. 1973) 358 F.Supp. 1025 (proposed highway segment scheduled to go through wetland areas).

Regardless of what the criteria may be for determining wheteher or not federal agency action is "major", the fact remains that respondent made absolutely no effort to determine the magnitude of the cost impact of its implementation plan. Respondent's refusal to certify "that the inflationary impact of the proposal has been evaluated" requires this Court to find that the implemenation plan was a nugatory gesture and invalid.

POINT II

The adoption of the implementation plan was invalid because the respondent based its action partially on inaccurate and erroneous premises.

In his memorandum adopting the implementation plan, the respondent's Regional Administrator said (40 F.R. 23280, app. 2a) "No person appearing at the hearing or

submitting testimony subsequently opposed the disapproval of the State implementation plan or the substitution of the proposed regulation by the Administrator."

A reading of the statement submitted by Mr. Lundmark at the hearing of February 18, 1975 (app. 19a-26a) makes it clear that petitioners in fact did oppose the adoption of the implementation plan by the EPA. Additionally, see Document 52 of the record, where William J. Lynch, Counsel of the Connecticut Department of Transportation indicated his opposition.

In *Wheatley* v. *Adler* (D.C. Cir. 1968), 407 F2d 307, it was held (at p. 310) "An administrative order must be set aside if it rests on factual premises not based on substantial record evidence. . . ." Judicial review of administrative actions requires a judicial finding that the agency's factual determinations were supported by substantial evidence. *Jewell* v. *Middendorf,* (Cal. 1975), 395 F. Supp. 43, 51.

POINT III

The implementation plan is invalid because the respondent failed to take into consideration other environmental factors.

The regulation at issue was adopted pursuant to 42 U.S.C. 1857c-5 (see 40 F.R. 23280). It is entitled:

> Preconditions for preparation and publication by Administrator of proposed regulations setting forth an implementation plan; hearings for proposed regulations; promulgation of regulations by Administrator; transportation regulations study and report; parking surcharge; suspension authority.

Sec. 1857c-5(c)(2)(A) pertains to an EPA study which is required to be made and submitted to Congressional

committees on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of implementation plans, and thus is only peripherally applicable to this case, but it shows the Congressional intent that implementation plans should be integrated with economic concerns and encouragement of mass transit. The last two sentences of that subdivision are:

> "The study shall include an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality."

The Court of Appeals for the Tenth Circuit has said in *Anaconda Company* v. *Ruckelshaus* (1973), 482 F2d 1301 (p. 1306):

> "This is not to say that the EPA is exempt from weighing and considering other environmental effects of its order. Being engaged in the environmental improvement effort, it must weigh these and other environmental factors such as economics."

Moreover, this Court in *Friends of the Earth, et al,* 75-7497 indicated its concern with the problem of air pollution in New York City caused by motor vehicle traffic. Reference is made to Point I, *supra,* for a discussion of environmental problems, as well as the economic impact, which could result from this rule making.

CONCLUSION

The action of the respondent at 40 F.R. 23279 and 23280 with respect to approval and promulgation of the air pollution implementation plan for Connecticut should be vacated and set aside.

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LLOYD H. BAKER
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ADDENDUM

(SEAL)

DEPARTMENT OF TRANSPORTATION

NEWS

FEDERAL HIGHWAY ADMINISTRATION

Washington, D. C. 20590

FOR RELEASE THURSDAY
August 14, 1975

(202) 426-0677
FHWA 75-75

The Federal Highway Administration of the U.S. Department of Transportation said today it has developed a handy reference table (attached) for persons considering getting into carpooling and saving money. The annual cost of driving alone a distance of 10 to 25 miles to work is $646 for operators of subcompact cars to $1,868 for standard size cars.

"The automobile represents the single largest user of petroleum products; consequently, it is a major factor in the energy problem. Any solution to the energy situation as the problems of urban congestion and air pollution, must include reduced use of the automobiles, especially driver-only occupancy. Every driver should seriously consider joining his company's "Double-Up" carpool campaign or start a ride sharing plan on his or her own," FHWA Administrator Norbert T. Tiemann said.

By sharing a car with one person, an employee can save up to 50 percent in transportation costs. With five persons per car, employees save up to 80 percent, an *annual* after-tax saving of $281 to $1,390, depending on the size of the car, carpool, and distance traveled.

Additional employee benefits include: less driving, reliable transportation, a guaranteed comfortable seat, the option of selecting riders, acceptable door to door travel times, saved energy resources, reduced air pollution, and reduced congestion in parking facilities and on highways.

Carpools carry more than 20 million commuters each day, more than twice as many as buses and fixed rail systems combined. Big American corporations, such as the Minnesota Mining and Manufacturing Company, Texas Instruments, Inc., Hallmark Cards, Aerospace Corporation, Jantzen, Inc., Government Employees Insurance Co. (GEICO), and the Boeing Company, have discovered that volunteer carpool programs increase auto occupancy between 10 and 35 percent. This kind of reduction in an entire urban area can dramatically reduce rush hour congestion. During the height of the 1973-74 energy crisis, Los Angeles reported a seven percent reduction in rush hour traffic from the preceding year, eliminating 40 percent of the city's normal traffic delays.

Nationwide, 50 million automobiles used for commuting each working day have had an average occupancy rate in the rush hour of 1.4 persons. However, 75 percent of the automobiles involved in the commuter working day carry only one person—the driver.

Simply "doubling-up" in commuting automobiles (raising the occupancy rate to 2.0 persons per car) would save more than 500,000 barrels of oil daily and remove 15 million cars from the road.

Raising the occupancy rate to 3.2 persons per car would save more than one million barrels daily.

Carpooling is an immediately available way to improve transportation productivity and reduce costs. Each two percent increase in auto occupancy nationally at rush hour would save about $1 billion annually in operating costs and capital expenditures. With about eight percent of the country's work force now using buses and fixed rail to commute to work, each two percent increase in ride sharing is equivalent to a 20 percent *increase* in mass transit use.

CARPOOL AND SAVE MONEY

SEE HOW MUCH CAR EXPENSE YOU CAN SAVE IN ONE YEAR BY CARPOOLING

HOME TO WORK	ITEM	SUBCOMPACT (PINTO, DATSUN, VEGA, VW, COLT)	COMPACT (NOVA, DART, MAVERICK, PACER)	STANDARD (MATADOR, CUTLASS, LTD,CAPRICE)
10 MILES	COST OF DRIVING TO WORK ALONE			
	GASOLINE AND OIL	$128	$176	$234
	MAINTENANCE AND REPAIR	97	109	130
	PARKING	145	145	145
	INSURANCE	166	176	189
	DEPRECIATION	110	143	250
	TOTAL	$646	$749	$948
	SAVINGS PER PERSON IN A:			
	2-PERSON CARPOOL	$281	$332	$427
	3-PERSON CARPOOL	361	427	553
	4-PERSON CARPOOL	402	474	617
	5-PERSON CARPOOL	425	502	654
15 MILES	COST OF DRIVING TO WORK ALONE			
	GASOLINE AND OIL	$193	$264	$352
	MAINTENANCE AND REPAIR	145	164	195
	PARKING	145	145	145
	INSURANCE	166	176	189
	DEPRECIATION	166	215	374
	TOTAL	$815	$964	$1,255
	SAVINGS PER PERSON IN A:			
	2-PERSON CARPOOL	$366	$433	$581
	3-PERSON CARPOOL	473	569	758
	4-PERSON CARPOOL	528	635	847
	5-PERSON CARPOOL	559	674	899
20 MILES	COST OF DRIVING TO WORK ALONE			
	GASOLINE AND OIL	$257	$352	$468
	MAINTENANCE AND REPAIR	193	218	260
	PARKING	145	145	145
	INSURANCE	166	176	189
	DEPRECIATION	221	286	499
	TOTAL	$982	$1,177	$1,561
	SAVINGS PER PERSON IN A:			
	2-PERSON CARPOOL	$449	$545	$734
	3-PERSON CARPOOL	595	712	963
	4-PERSON CARPOOL	654	796	1,077
	5-PERSON CARPOOL	693	845	1,145
25 MILES	COST OF DRIVING TO WORK ALONE			
	GASOLINE AND OIL	$321	$440	$585
	MAINTENANCE AND REPAIR	241	273	325
	PARKING	145	145	145
	INSURANCE	196	176	189
	DEPRECIATION	276	358	624
	TOTAL	$1,149	$1,392	$1,868
	SAVINGS PER PERSON IN A:			
	2-PERSON CARPOOL	$533	$652	$887
	3-PERSON CARPOOL	697	854	1,167
	4-PERSON CARPOOL	778	955	1,307
	5-PERSON CARPOOL	823	1,015	1,390

UNITED STATES COURT OF APPEALS

For the Second Circuit

Robert W. Blanchette, etc.,

Petitioners,

against

United States Environmental Protection Agency,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, Apt. 1, New York, New York
That on June 24, 1976, he served two copies of the Brief and one copy of the Appendix on

Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530
Att: Kathryn A. Oberly, Esq.
Appellate Section

Jean Sutton, Esq.
Environmental Protection Agency
Room 2203
John F. Kennedy Federal Building
Boston, Massachusetts 02203

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Juan Delgado

Sworn to before me this
24th day of June, 1976

John V. Esposito

JOHN V. ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977